

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 July 2022

**Public Authority:** Financial Conduct Authority  
**Address:** 12 Endeavour Square  
London  
E20 1JN

#### **Decision (including any steps ordered)**

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1. The complainant requested information from the Financial Conduct Authority ("the FCA") relating to the summary dismissal of employees and contractors for gross misconduct since April 2016. The FCA disclosed some information but withheld the requested information for points 1, 2 and 4 under section 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that the FCA were entitled to rely on section 40(2) (personal information) of FOIA to withhold the information. However, they failed to respond to the request within the statutory time frame of 20 working days and have therefore breached section 10(1) of FOIA.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

## Request and response

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4. On 8 June 2021, the complainant contacted the FCA and requested information in the following terms:

“(1) Since 01 April 2016, how many FCA employees and contractors were penalised with summary dismissal after a harassment complaint was upheld against them?

(2) Please can you provide a breakdown of the information requested in (1) of the numerical count as well as percentages in the following categories:

- a) Male Non-BAME
- b) Male BAME
- c) Female Non-BAME
- d) Female BAME

(3) Since 01 April 2016, how many FCA employees and contractors were penalised by summary dismissal after being found guilty of gross misconduct?

(4) Please can you provide a breakdown of the information requested in (3) of the numerical count as well as percentages in the following categories:

- a) Male Non-BAME
- b) Male BAME
- c) Female Non-BAME
- d) Female BAME

(5) Since 01 April 2016, how many FCA employees and contractors who were penalised with summary dismissal after a harassment complaint was upheld against them, successfully won any subsequent appeal?

(6) Please can you provide a breakdown of the information requested in (5) of the numerical count as well as percentages in the following categories:

- a) Male Non-BAME
- b) Male BAME
- c) Female Non-BAME
- d) Female BAME

(7) Since 01 April 2016, how many FCA employees and contractors who were penalised with summary dismissal after being found guilty of gross misconduct, successfully won any subsequent appeal?

(8) Please can you provide a breakdown of the information requested in (7) of the numerical count as well as percentages in the following categories:

- a) Male Non-BAME
- b) Male BAME
- c) Female Non-BAME
- d) Female BAME."

5. The FCA responded on 22 November 2021 disclosing information for point 3 of the request and advising they do not hold percentage figures and that for point 5 and 7 the answer was none so points 6 and 8 do not apply. They refused the requested information for points 1, 2, and 4 citing section 40(2) of FOIA to do so.
6. On 23 December 2021, at internal review, the FCA explained further its response to point 5 of the requests and maintained its stance to withhold the requested information for points 1, 2 and 4 under section 40(2) of FOIA and gave a further explanation of why the exemption at section 40(2) applied in this specific case.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 23 December 2021 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the FCA is entitled to rely on section 40(2) of FOIA to withhold the requested information for points 1, 2 and 4. As well as to consider the breach under section 10 of FOIA in relation to the delay in the FCA's response to this request.

## Reasons for decision

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### Section 40 personal information

9. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
10. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of FOIA cannot apply.

Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

12. Section 3(2) of the DPA defines personal data as:  
  
"any information relating to an identified or identifiable living individual."
13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

15. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
16. The information withheld under section 40(2) of FOIA is that of personnel details of employees and contractors of the FCA who have gone through disciplinary action due to gross misconduct.
17. The requester has stated that they do not agree that small numbers by themselves would enable identification, and that the FCA have not identified any other source of information available to a motivated intruder or the steps such a motivated intruder could take to identify individuals from the relevant number. And that each case should be assessed on its own merits on a case-by-case.
18. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to a small number of data subject(s). He is satisfied that this information both relates to and could identify the data subject(s) concerned.
19. The Commissioner agrees with the FCA that when combined with other information relating to employees and contractors, it is possible given the very specific nature of points 1,2 and 4 that identification could be made. It is particularly possible the complainant who is an ex-employee of the FCA themselves, may hold additional information to be able to identify individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”

23. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.

24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

25. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
26. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:
- "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>2</sup>.
27. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test: -
- i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information.
  - ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question.

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<sup>2</sup> Article 6(1) goes on to state that: -

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) of FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that: -

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted"

iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

28. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### Legitimate interests

29. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits.

30. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

31. In this case the requester has a personal interest in disclosure of the withheld information to ensure the FCA has followed its own guidance and procedures and its wider obligations under UK law and has not taken a blanket approach to requests of this nature.

32. The FCA acknowledges that the legitimate interest is that of transparency and openness, as well as an understanding of how decisions are made within the FCA.

33. There is also the broader legitimate interest of transparency and openness of the FCA carrying out its day to day functions.

34. The Commissioner accepts the complainant has a legitimate interest in obtaining the information, and that there is the broader legitimate interest of transparency and openness of the FCA's processes and procedures.

#### Is disclosure necessary?

35. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

36. The FCA has confirmed the specific information redacted under section 40 of FOIA is not available elsewhere in the public domain.
37. The complainant has indicated the information was not available to them elsewhere at the time of their request.
38. The Commissioner accepts, that disclosure of the withheld information may have been useful for the purposes of accountability and transparency as well as demonstrating the FCA's non-discrimination policies.

Balance between legitimate interests and the data subject's interests' fundamental rights and freedoms

39. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
40. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause.
  - whether the information is already in the public domain.
  - whether the information is already known to some individuals.
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
41. In the Commissioner's view, a key issue is whether the individual(s) concerned have a reasonable expectation their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
42. The FCA have argued that the fundamental rights and freedoms of the data subjects are not overridden by any legitimate interest, due to the particular circumstances of the case, the information relates to complaints about individuals and their dismissal by the FCA and there is



a risk of harm and distress to the individuals concerned if their identities were to become publicly known.

43. They go on to say that some of the information relates to former staff below management level whose roles do not require a significant level of personal judgement and responsibility and they would not expect their role to be subject to public scrutiny. They also considered whether disclosure of the personal data in question would be fair and transparent. The individuals in question have a reasonable expectation that their personal information (in this case information which may lead to them being identified) should be protected and not made public.
44. The FCA recognises the legitimate interest in the public or applicant having access to the withheld information. However, they say release of any such information may be detrimental to the individuals concerned and that considerable personal distress would be likely to be caused if this led to comment and/or speculation about their identities and/or the nature of any complaints about them. And consider that disclosure would be unfair to the individuals as it would attract "undue" attention to them and attract a level of scrutiny and attention which would be unfair to the individuals involved and could also potentially impact both their private and professional lives.
45. The Commissioner considers that disclosure of the withheld information, would contribute towards the accountability of the FCA, and in particular around dismissal of BAME employees or contractors to ensure they are not of a disproportionate level. However, disclosure under FOIA is disclosure to the world at large and not just to the requester. It is the equivalent to the FCA publishing the information on its website.
46. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
47. As the requested information could potentially lead to identification of specific individuals the Commissioner agrees with the FCA in its application of the exemption under section 40(2) of FOIA. It is unlikely the employees would have an expectation for information to be disclosed which might make them identifiable. It is likely that such disclosure would cause distress to those employees.
48. The Commissioner considers that disclosure of this information would be disproportionately intrusive to the data subjects in this situation and interference with their rights to privacy must be proportionate.

Commissioner's conclusion

49. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
50. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to consider whether disclosure would be fair or transparent.
51. The Commissioner has therefore decided that the FCA was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## **Section 10**

52. Section 1(1) of FOIA states that:

Any person making a request for information to a public authority is entitled

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

53. Section 8(1) of the FOIA states:

In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,
- (b) states the name of the applicant and an address for correspondence, and
- (c) describes the information requested.

54. The Commissioner considers that the request in question fulfilled these criteria and therefore constituted a valid request for recorded information under FOIA.
55. Section 10 of FOIA states that responses to requests made under the Act must be provided "promptly and in any event not later than the twentieth working day following the date of receipt". In this case, the FCA took over five months to respond to the request.

56. From the evidence presented to the Commissioner in this case in failing to issue a response to the request within 20 working days, the FCA has breached section 10 of FOIA.

## Right of appeal

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57. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

58. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**